In The

Supreme Court of the United States

October Term, 1974

No. 74-70

LEWIS H. GOLDFARB AND RUTH S. GOLDFARB,
INDIVIDUALLY AND AS REPRESENTATIVES OF THE CLASS OF
RESTON, VIRGINIA HOMEOWNERS,
Petitioners,

v.

VIRGINIA STATE BAR AND
FAIRFAX COUNTY BAR ASSOCIATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT FAIRFAX COUNTY BAR ASSOCIATION IN OPPOSITION

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The Fairfax County Bar Association hereby respectfully opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

I

QUESTIONS PRESENTED

1. Whether the rescission of the advisory minimum fee schedule by the Fairfax County Bar Association has rendered this case moot.

2. Whether a county bar association advisory minimum fee schedule restrained trade or commerce among the several states.

3. Whether the legal profession is entitled to the learned profession exemption from the antitrust laws.

4. Whether the promulgation of the advisory minimum fee schedule pursuant to a scheme of state regulation is exempt from the antitrust laws.

5. Whether the mere suggestion of minimum fees constitutes unlawful price-fixing.

II.

STATEMENT OF THE CASE

A.

Proceedings Below

Lewis H. and Ruth S. Goldfarb (the Goldfarbs) brought this action in the United States District Court for the Eastern District of Virginia, against the Fairfax County Bar Association (Fairfax) and the Virginia State Bar (State Bar), charging that the promulgation of an advisory minimum fee schedule, as it applied to legal fees for real estate work, constituted a violation of § 1 of the Sherman Act. The suit sought treble damages and injunctive relief pursuant to §§ 4 and 16 of the Clayton Antitrust Act, 15 U.S.C. §§ 15, 26. Fairfax denied that it had violated

the federal antitrust laws. The damage issue was severed, and the issue of liability was tried by the court without a jury. The district court held that Fairfax's promulgation of an advisory minimum fee schedule constituted price-fixing in *per se* violation of § 1 of the Sherman Act.[1]

On February 2, 1973, a judgment was entered enjoining the use by Fairfax of the advisory minimum fee schedule. Fairfax appealed from that judgment to the United States Court of Appeals for the Fourth Circuit. That court reversed the district court's finding that Fairfax had violated the Sherman Act, holding that the advisory minimum fee schedule was neither in interstate trade or commerce nor did it have a sufficient effect upon interstate trade or commerce to violate the Sherman Act. Further, the court held that restraints upon competition among lawyers, members of a learned profession, are exempt from challenge under the Sherman Act.

B.

The Parties

The Goldfarbs, in the course of their 1971 purchase of a home in Reston, Virginia, made use of the services of a Fairfax County attorney. The Goldfarbs purport to represent a class of plaintiffs consisting of all home buyers in Reston between February 22, 1968, and February 22, 1972.

Fairfax is a voluntary association consisting of attorneys practicing in Fairfax County, Virginia.

The State Bar is an agency of the Commonwealth of Virginia, created by the Virginia Supreme Court pursuant to § 54-49 of the Code of Virginia, whose membership consists of all attorneys licensed to practice law in Virginia.

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[1] The court on the other hand held that the role of the state agencies in the matter was state action exempt from antitrust challenge. Accordingly, it dismissed the action as to the State Bar.

C.

The Purchase

In 1971 the Goldfarbs, who then resided in Arlington, Virginia, signed a contract to purchase a home in Reston, Virginia.[2] The purchase was financed by a deposit with a Virginia contractor of $2,000, a down payment of $37,500, and a $15,000 loan from a lending institution, also in Virginia, secured by a first deed of trust on the property.

The Goldfarbs purchased title insurance, which covered the interest of the mortgagee and their own interest in the property, and retained A. Burke Hertz, an attorney licensed to practice law in Virginia, to handle the legal aspects of the transaction, including the examination and certification of the state of title to the property. The closing on the Goldfarbs' home occurred at Mr. Hertz' Falls Church, Virginia, office.

The Goldfarbs paid Mr. Hertz a fee for examination of title that was equal to the fee recommended by the advisory fee schedule published by Fairfax and other local bar associations, and was equal also to the fee specified in the Minimum Fee Schedule Report promulgated by the State Bar, an official agency of the Commonwealth of Virginia.

D.

State Regulation And The Advisory Fee Schedule

Pursuant to the statutory authority of § 54-48 of the Code of Virginia empowering the Supreme Court of Virginia to prescribe a code of ethics governing the professional conduct of lawyers and to establish disciplinary procedures,

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[2] At the time of the purchase, the builder who had constructed the Reston home and the real estate agent through whom the home was purchased both maintained their offices in Reston, Virginia.

that court has adopted and promulgated the Canons of Ethics and Code of Professional Responsibility of the Virginia State Bar. Both the Canons and the Code contemplate and approve advisory fee schedules (Findings of Fact, 355 F.Supp. at 498).

The State Bar, as the legislatively established administrative arm of the Virginia Supreme Court, has been delegated official responsibility for implementing and enforcing the Canons and the Code, including the provisions relating to advisory fee schedules. Accordingly, its advisory opinions rendered pursuant to this authority affirm the propriety of advisory fee schedules (Findings of Fact, 355 F.Supp. at 498-99). In addition, the State Bar's Minimum Fee Schedule Reports in 1962 and 1969 recommended fees for legal services in connection with real estate transactions essentially identical to the suggested fees of the Fairfax advisory schedule (Findings of Fact, 355 F.Supp. at 499). In the course of exercising the responsibility for continuing supervision of fee practices by Virginia lawyers, the State Bar has reviewed the advisory fee schedules of the local bar associations, incorporated them in its own official reports, and disseminated fee information throughout the state.

As the administrative arm of the Supreme Court of Virginia, the State Bar has responsibility for investigating complaints of unprofessional conduct of any of its members. The State Bar has ruled that habitually charging less than the fee prescribed by a local minimum fee schedule can constitute professional misconduct (State Bar Opinions 98, Ex. 30; 170, Ex. 31, Appendix, *infra*, pp. 8-11).

Individual investigations of complaints of unprofessional conduct are carried out by district committees comprised of lawyers appointed by the Council of the State Bar. Investigated findings must be reported to a court of appropriate jurisdiction for further disciplinary proceedings.

The evidence at the trial, however, showed that no attorney has ever been disciplined in Virginia for habitually charging less than the fees prescribed in a minimum fee schedule. The Fairfax Bar Association has never investigated or imposed any sanctions on any member for habitually undercutting its advisory schedule. The evidence also showed that attorneys in Fairfax regarded the fee schedule as a recommendation to be considered among many other factors when establishing an appropriate charge for legal services rendered (Findings of Fact, 355 F.Supp. at 498, 500).

Fairfax, in reliance upon the authority of the State Bar and together with the bar associations of Arlington and Loudoun Counties and the City of Alexandria, adopted its most recent advisory minimum fee schedule on June 12, 1969. The schedule was never circulated to the Association members, but was merely retained at the Fairfax County Courthouse for the use of lawyers who expressly requested it.

On September 16, 1974, Fairfax rescinded its advisory minimum fee schedule, and stated its intention not to reinstitute any fee schedule (App. p. 1).

III.

SUMMARY OF ARGUMENT

For several reasons, the petition for a writ of certiorari should be denied. First, Fairfax's rescission of its minimum fee schedule has mooted the case. A judgment that Fairfax violated the Sherman Act by promulgating a minimum fee schedule should in any event be applied prospectively, limiting the petitioners to injunctive relief only. Because Fairfax has rescinded its minimum fee schedule and does not intend to renew it, the Goldfarbs are no longer in need of relief from this Court. A decision on the merits by this

Court would thus not affect the rights of either petitioners or Fairfax. Under the applicable Supreme Court standards this case is therefore not appropriate for Supreme Court review. There will be time enough to review the issues raised by petitioners here in the context of the existing facts of another case where the issues are alive and rights may still be affected.

Second, the decision of the Court of Appeals that Fairfax did not violate the Sherman Act was entirely correct. At the outset, the jurisdictional requirements are not met because the activities challenged by this lawsuit—fees for title examinations—occurred wholly within the State of Virginia. They thus did not occur in interstate commerce, nor was there any showing of direct and substantial effect upon interstate commerce.

Next, the Court of Appeals followed the established rule that the practice of law does not constitute trade or commerce, but is rather a learned profession. Thus, the Sherman Act, which applies only to restraints upon trade or commerce, does not apply to restraints upon competition among members of the legal profession.

The judgment below is supported by the sound rule of *Parker* v. *Brown*, 317 U.S. 341 (1943), that private actions mandated by state agencies pursuant to a scheme of state regulation cannot be challenged under the antitrust laws. The promulgation of an advisory minimum fee schedule, sanctioned by the panoply of state regulation in Virginia, should not now be held to have subjected a local bar association to antitrust liability.

Finally, there exists an additional ground, not considered by the Court of Appeals, for deciding that no Sherman Act violation occurred in this case. Fairfax intended that its fee schedule be advisory only, to be considered as one of many factors in deciding the reasonableness of a fee under

the applicable ethical rules of the legal profession. Fairfax accordingly did not engage in unlawful price-fixing. Nor was there any showing of injury to the plaintiffs in this case.

The petition should accordingly be dismissed.

IV.

ARGUMENT

A.

The Fairfax County Bar Association's Rescission Of Its Advisory Minimum Fee Schedule Has Rendered This Case Moot.

As recently stated by this Court in *DeFunis* v. *Odegaard*, ... U.S. ....., 40 L.Ed. 2d 164 (1974), " 'federal courts are without power to decide questions that cannot affect the rights of the litigants before them.' " 40 L.Ed. 2d at 168. [Quoting *North Carolina* v. *Rice*, 404 U.S. 244 (1971)]. This requirement is not met in the case at bar.

Even assuming that after years of unchallenged use, advisory minimum fee schedules are to be held to have violated the Sherman Act, any relief against that violation in this case should be granted prospectively only. In that event, petitioners would be entitled only to injunctive and declaratory relief. Since the advisory minimum fee schedule has been rescinded, nothing remains to be enjoined or declared illegal. Furthermore, there is no likelihood of recurrent violation. Therefore, a decision by this Court as to the legality of the former advisory minimum fee schedule would not affect the rights of the litigants before this Court.

1.

PROSPECTIVITY

In *Chevron Oil Co.* v *Huson*, 404 U.S. 97 (1971), the Supreme Court listed three separate considerations for de-

termining whether a civil decision should be applied non-retroactively. First, "the decision . . . must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . , or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . ." Second, a court should look "to the prior history of the [proposed] rule in question, its purpose and effect, and whether retrospective operation will further retard its operation." Third, a court should weigh "the inequity imposed by retroactive application . . . ." 404 U.S. at 106-107. All of the *Chevron* criteria are met in this case.

First, application of the antitrust laws to the legal profession would overrule past precedent. Supreme Court decisions in *FTC* v. *Raladam,* 283 U.S. 643 (1931), and *Atlantic Cleaners & Dyers* v. *United States,* 286 U.S. 427 (1932), established that the term "trade," as used in the Sherman Act, does not include the "learned professions." In the forty-one years since *Atlantic Cleaners* the Supreme Court has never changed this position. Lawyers thus have assumed that they practice a learned profession.

More specifically, since the inception of the Sherman Act, members of the legal profession have justifiably assumed that minimum fee schedules were safe from antitrust attack. At least thirty-four states and hundreds of local bar associations have promulgated such schedules. Advisory fee schedules have been contemplated by the Canons of Ethics and the Code of Professional Responsibility. Numerous state court decisions have approved the use of minimum fee schedules as persuasive evidence of a reasonable fee.[3] In-

[3] *See, e.g., Matter of Freeman,* 40 App. Div. 2d 397 (N.Y. 1973); *Buckles* v. *Continental Cas. Co.,* 197 Ore. 128, 252 P.2d 184 (1952); *Re Felton's Estate,* 199 Misc. 507, 99 N.Y.S. 2d 351 (1950); *Succession of Neil,* 205 La. 214, 17 So.2d 255 (1944); *Broughton* v. *Nance,* 244 Ala. 499, 14 So. 2d 505 (1943).

deed, in these cases the judges themselves referred to such schedules to help them determine the amount of attorneys' fees to award.

Until very recently, the Justice Department had never brought a suit challenging an advisory minimum fee schedule in the legal profession. To the contrary, in response to an inquiry from the Arlington County Bar Association, an Assistant Attorney General of the Antitrust Division of the Justice Department advised the Arlington Bar in 1961: "The Antitrust Division has never taken the position in the past that advisory minimum fee schedules established by Bar Associations were subject to prosecution under the federal antitrust laws." He went on to say that the Department's position was based upon the fact that local bar activities were not "in commerce" and the fact that the fee schedules were advisory only (Ex. 36, App. 12).

In 1965 Donald F. Turner, Acting Assistant Attorney General of the Antitrust Division, reiterated the Department's position that mere advisory fee schedules were not subject to antitrust challenge (Ex. 40, App. 14). Indeed, the absence of any litigation whatsoever until the present suit is indicative of the prevalent view that advisory fee schedules did not violate the antitrust laws. Thus this Court is plainly being asked to decide "an issue of first impression whose resolution was not clearly foreshadowed . . . ." 404 U.S. at 106.

Nor would imposition of treble damages upon Fairfax advance the purpose of a rule declaring advisory fee schedules in violation of the Sherman Act. The obvious purpose of such a rule would be to deter the promulgation and use of such schedules. This purpose may be accomplished, however, without the harsh imposition of damages for a retroactive violation of the rule. The Justice Department's abrupt

reversal of its view of lawyers' fee schedules has been widely publicized. Indeed, the Department has only very recently challenged a fee schedule promulgated by the Oregon State Bar. Such enforcement activity must have a chilling effect upon the promulgation of fee schedules.

Finally, in view of *Atlantic Cleaners* and the prevalent belief that minimum fee schedules did not violate the antitrust laws, retroactive application of a decision that minimum fee schedules are unlawful would impose substantial inequity upon thousands of lawyers across the country. Retroactive application would mean that hundreds of local bar associations would be subject to incredibly burdensome treble damages liability for activities thought to be perfectly legal, indeed approved by authoritative professional bodies.

2.

MOOTNESS

Any prospective decision by this Court as to the illegality of the advisory minimum fee schedule promulgated by Fairfax would preempt an award of damages to plaintiffs, in favor of an injunction against the future promulgation of such advisory fee schedules. Such relief is unnecessary in this case, for Fairfax has already rescinded its advisory minimum fee schedule and has stated its intention not to institute such schedules in the future (App. 1).

In *DeFunis* v. *Odegaard*, ... U.S. ....., 40 L.Ed. 2d 164 (1974), this Court recently reiterated the criterion for determining when a case is moot. Because a decision in that case was no longer necessary to provide the appropriate relief, this Court held that the case was moot. "The controversy between the parties has thus clearly ceased to be 'definite and concrete' and no longer 'touch[es] the legal relations of parties having adverse legal interests.'" 40 L.Ed. 2d at 169.

In so holding, this Court expressed its willingness to rely upon a representation of intention by one of the parties. "[I]t has been the settled practice of the court, in contexts no less significant, fully to accept representations such as these as parameters for decisions." 40 L.Ed. 2d at 169.

To be sure, the *DeFunis* case does distinguish a line of decisions establishing the general rule that a case does not become moot merely because the defendant has voluntarily ceased the allegedly illegal conduct. *See, e.g., United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632 (1953). Even so, this Court said in *Grant*, the case would still be moot if it could have been said with assurance "that there [was] no reasonable expectation that the wrong would be repeated." *Id.* at 633.

Thus, this distinction does not serve to render *DeFunis* inapplicable to the case at bar, for there is no reasonable expectation that Fairfax will repromulgate an advisory minimum fee schedule. Now that the Justice Department has stated its belief that minimum fee schedules are unlawful under the antitrust laws, and indeed has filed a lawsuit against a minimum fee schedule in Oregon, lawyers are on notice that they may be violating the law in promulgating such schedules. The unmistakable trend in this country is thus toward rescission of minimum fee schedules. The Fairfax County Bar Association, composed entirely of lawyers, has stated that it will not repromulgate a minimum fee schedule. This representation, as in *DeFunis*, should be sufficient to establish that there is no likelihood in this case of a recurrent violation.[4]

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[4] This Court has on a number of occasions decided that a case was mooted by voluntary cessation of the challenged activity. *See, e.g., Commercial Cable Co.* v. *Burleson*, 250 U.S. 360 (1919); *A. L. Mechling Barge Lines, Inc.* v. *United States*, 368 U.S. 324 (1961); *Oil Workers Local 8-6* v. *Missouri*, 361 U.S. 363 (1960).

Although in *W. T. Grant Co.* this Court refused to hold that the lawsuit was actually moot, even then it considered whether injunctive relief was appropriate against discontinued acts. This Court noted that, although injunctions are directed at future violations, the moving party must still satisfy the court that relief is needed.

> "The necessary determination is that there exists some cognizable danger of recurrent violation, something more than a mere possibility which serves to keep the case alive. . . . To be considered are the bona fides of the express intent to comply, the effectiveness of the discontinuance, and in some cases, the character of the past violations." *Id.* at 633.

In *Grant,* the government relied on the fact that the defendant had failed to terminate his violation until after the suit was filed and expressly refused to concede that the activity in question was illegal. This Court nevertheless refused to grant injunctive relief, noting that the government had only recently attempted systematic enforcement of the law involved and that the defendants had sworn under oath that they would not resume the challenged activity.

These considerations would seem relevant to this Court's decision whether to grant the petition. Unquestionably, Fairfax is sincere in its stated intention not to promulgate another minimum fee schedule. Moreover, the character of its alleged past violation clearly reveals that Fairfax is not the kind of defendant to engage in repeated violations of the law. It had been assumed by lawyers for years that advisory minimum fee schedules were perfectly legitimate. Only recently has anyone, governmental or private, challenged their legality. Injunctive relief is therefore inappropriate and unnecessary.

B.

The Court Of Appeals Correctly Held That the Alleged Antitrust Violation Did Not Restrain Trade "Among the Several States."

Section 1 of the Sherman Act prohibits only restraints of trade "among the several states." To meet this requirement, the acts complained of must either (1) occur within the flow of interstate commerce, *Las Vegas Merchant Plumbers' Association* v. *United States,* 210 F.2d 732, 739 n. 3 (9th Cir.), *cert. denied,* 348 U.S. 817 (1954), or (2) significantly affect interstate commerce, *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.,* 334 U.S. 219, 234 (1948). Thus, the Sherman Act fails to reach commercial activity if it is not in the flow of interstate commerce and is either essentially local or has only an insignificant effect on interstate commerce. The Court of Appeals correctly held that the challenged activity in the case at bar fails to meet either of these tests.

The plaintiffs were residing in Virginia when they contracted to purchase a home in Reston, Virginia (Findings of Fact, 355 F.Supp. at 500). The owner of the home and his real estate agency were located in Virginia (Findings of Fact, 355 F.Supp. at 500). All transactions relating to the purchase of plaintiffs' home, including the negotiation for sale, contract of sale, title examination, securing of the mortgage loan, settlement, and all legal services, occurred within the State of Virginia (Findings of Fact, 355 F.Supp. at 500).

The Court of Appeals correctly held that the fact that many residents of Fairfax County work outside of Virginia is totally irrelevant. Such interstate movement of persons is merely incidental to the purchase of homes in Virginia. As the Court of Appeals aptly stated:

> "The interstate commerce which is allegedly affected by the fee schedule is the financing of home mortgages;

> the fact that the mortgagor commutes across state lines to his job is of no interest to the mortgagee or to this court." 497 F.2d at 16-17.

The court noted that the practice of real estate law is an activity of essentially local character. Further, the court found no case holding that a local service may be subject to the Sherman Act merely because the consumer or recipient of the service utilized it incidentally in the course of transacting interstate business.

Burke v. *Ford*, 389 U.S. 320 (1967), cited by petitioners, is clearly distinguishable from the case at bar. In *Burke* this Court held that a division of territories among Oklahoma liquor dealers, whose liquor was sent from out-of-state, was shown to have had a substantial effect on interstate commerce. Obviously, the very subject of the restraint, liquor, was involved in interstate commerce. In the case at bar, however, the lawyers' service of title examination is the essence of the challenged activity, and it is clearly intrastate. Mortgage money, some of which may come from out-of-state, has nothing to do with the title examination, and therefore does not serve to bring it within the interstate commerce requirement of the Sherman Act.

Contrary to petitioners' assertion, there is no conflict among the circuits on this point. *Doctors, Inc.* v. *Blue Cross of Greater Philadelphia*, 490 F.2d 48 (3d Cir. 1973), cited by petitioners as a conflicting decision, may be distinguished on its facts. In refusing to dismiss that case for lack of subject matter jurisdiction, the court held that the alleged effects on interstate commerce were direct and substantial. In the instant case, however, the simple fact is that petitioners established, at most, nothing more than an incidental and insignificant effect upon interstate commerce. There was no proof whatever that the minimum fee schedule sig-

nificantly restrained the flow of mortgage money into Virginia.

Thus, the legal "tests" are settled, but each case in this area turns upon its unique facts. The seeming inconsistency, if any there be, results not from a conflict as to the applicable law, but rather from the inevitable differences in facts and the quality of proof in individual cases.

Petitioners argue that allowing the decision of the Court of Appeals to stand would prevent Congress from regulating minimum fee schedules under the Commerce Clause. Obviously the Court of Appeals did not intend, nor will its decision require, such a result. Its holding with regard to interstate commerce rests on the narrow ground that the challenged activity *in this case* is essentially local and has no substantial effect upon interstate commerce. It remains to be determined whether in other cases other minimum fee schedules may restrain trade or commerce among several states. As pointed out in *Doctors, Inc.*, "precedent in this area is unlikely to dictate the outcome in any given case." 490 F.2d at 51.

C.

The Court Of Appeals Correctly Held That Insofar as the Advisory Minimum Fee Schedule Restrained Competition among Attorneys, Members of a "Learned Profession," It Is Not Subject to the Provisions of the Sherman Act.

Section 1 of the Sherman Act prohibits contracts, combinations, or conspiracies in restraint of *trade or commerce*. The Supreme Court has consistently recognized that services rendered by a "learned profession" do not constitute "trade or commerce." *See FTC* v. *Raladam*, 283 U.S. 643 (1931) (medical profession); *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs*, 259 U.S. 200, 209 (1922) (legal profession); *At-*

lantic Cleaners & Dyers v. *United States,* 286 U.S. 427 (1932) (learned profession generally).

The unique characteristics and needs of the legal profession provide sound policy grounds for the learned profession exemption. As in the regulated industries, society has chosen to withdraw the discipline of competition and substitute instead a regulatory mechanism in the form, in Virginia, of the State Bar. Each component of the practice of law is supervised and regulated by the State Bar. Entry into the profession is controlled through the bar examination and licensing procedure. Poor legal service is prevented by enforcement of the Canons of Ethics. And proper fee practices are mandated by the Canons of Ethics as supplemented by the advisory minimum fee schedules. Indeed, states have forbidden the very essence of competition—the solicitation of clients. Regulation thus substitutes for competition as the governor of the legal profession.

Petitioners contend that they do not seek to utilize the Sherman Act to regulate the manner in which legal services are rendered. Nevertheless, a decision that the Sherman Act applies with full force to the legal profession would result in an unprecedented revolution in the legal profession with harmful effects to the public. The destructiveness of competition in the legal profession results from the difficulty that clients would encounter in making quality comparisons among lawyers' services. Since that would make price comparisons determinative to most consumers, there would exist a positive disincentive for the investment of time in legal activity. The inevitable effect would be to reduce the quality of legal services. The greater the difficulty of the consumer in judging quality,

> ". . . the greater the temptation of competitors to cut corners, since the competitor that skimps does not at

> once lose all his customers, while the one that scrupulously maintains quality may be inadequately rewarded for the higher costs of doing so." 2 Kahn, *The Economics of Regulation* (New York, 1971) at 176.

The price of such competition would be particularly high in the area of real estate law, where any deficiency in a title examiner's work would not be known for years. In most cases only when a family sought to sell their home, after years of residence and paying mortgage lenders, would it become evident that faulty legal work had deprived them of the benefits of quiet title.

A ruling by this Court that minimum fee schedules violate § 1 of the Sherman Act would inevitably entail other harmful effects. Such a ruling would necessarily contravene the profession's prohibitions of solicitation and advertising. As the Court of Appeals noted, lawyers would face the dilemma of choosing between liability under the Sherman Act for adherence to the profession's rules, on the one hand, and discipline from their local bar associations for engaging in unrestrained and unethical competition on the other.

Other unforeseen and certainly unintended consequences could flow from such a holding. Lawyers considering the establishment of a partnership would be required to analyze their plans under the standards of § 7 of the Clayton Act prohibiting anticompetitive mergers. Special fee arrangements for retainer clients might be regarded as unlawful price discrimination, or, at the very least, exclusive dealing violative of §3 of the Clayton Act. A single law firm in a small town, rather than serving all who need legal services, would be required to consider turning down business to avoid violation of the monopolization provisions of § 2 of the Sherman Act.

The Court of Appeals was careful to limit the learned profession exemption to restraints upon competition among members of the learned profession. It was on this basis that the court distinguished *American Medical Association* v. *United States,* 317 U.S. 519 (1943), in which this Court held that a group of doctors violated the Sherman Act when they conspired to obstruct the interstate sale of health insurance. This Court expressly refused to determine whether the practice of medicine constitutes "trade" under § 3 of the Sherman Act. *Id.* at 528. Nevertheless, if the doctors had conspired to restrain the practice of another doctor, there would have been no Sherman Act violation, since the practice restrained, a learned profession, is neither trade nor commerce.

If the antitrust laws are to be applied to the learned professions with all the attendant potential for undesirable results, that ought to be done by the legislature taking the special characteristics of the professions into account. As the Fourth Circuit said, this is an area where judicial legislation is particularly inappropriate.

> "In our governmental system a legslative body is better equipped to accommodate these restrictions imposed upon the practice of a profession to the overall design and purpose of the antitrust laws." 497 F.2d at 19.

D.

The Fairfax Advisory Minimum Fee Schedule Is Exempt from Antitrust Challenge as Lawfully State-Regulated Action.

This Court has long applied the principle that the antitrust laws should not apply to disrupt state regulation. In *Parker* v. *Brown,* 317 U.S. 341 (1943), private action approved by state regulatory authority was challenged under the federal antitrust laws. This Court, finding that Congress

did not intend that the Sherman Act should hinder a state's ability to regulate in the interest of its citizens, held the state-approved private action exempt from antitrust challenge.

The Court of Appeals said that *Parker* set forth three factors to be considered when determining whether a challenged activity is entitled to the state action exemption. First, the challenged action must be in the public interest. Second, the industry must be actively and continually supervised by independent state officials. Third, the challenged activity must receive its authority and efficacy from a legislative command of the state. Although the Court of Appeals found that the primary aim of the minimum fee schedule promulgated by Fairfax was to benefit the public, it held that the two other "requirements" of *Parker* were not satisfied.

In refusing to afford *Parker* immunity to Fairfax in this case, the Court of Appeals erred in two respects. First, it misinterpreted *Parker* as requiring active, independent state supervision of challenged activity. Second, it erred in finding that Fairfax's minimum fee schedule did not receive their authority and efficacy from a legislative command of the state.

Scrutiny of the *Parker* opinion reveals that it simply does not hold that activities must be under active state supervision to become entitled to the state action exemption. Rather, *Parker* requires only that state involvement in the challenged activity must be sufficient to characterize the activity as state-approved and contemplated rather than purely individual. Thus, private action deriving "its authority and efficacy from a legislative command of the state" cannot be challenged under the antitrust laws. 317 U.S. at 350.

In *Parker* the Supreme Court held that a program to

regulate the marketing of raisins, proposed by private producers but adopted and enforced by a state agency, was a product of state action and therefore was not subject to antitrust attack.

> "[I]t is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and efficacy from the legislative command of the state and was not intended to operate or become effective without that command." *Id.* at 350.

Thus the basis for the Court's view was that the Sherman Act, though clearly intended to prevent restraints of competition by individuals and corporations, was not meant to restrain "state action or *official action directed by a state.*" *Id.* at 351 (emphasis added). Nowhere in the *Parker* opinion did the Court say that active, independent state supervision is required.

Contrary to the view of the Court of Appeals, Fairfax's minimum fee schedules did derive their authority and efficacy from a legislative command of the State of Virginia. The Virginia State Bar is created and authorized by statute to supervise and regulate the activities of lawyers in Virginia. Virginia Code §§ 54-48 *et seq.* As the administrative agency of the Supreme Court of Virginia, the State Bar administers rules and regulations promulgated by the Supreme Court to govern the conduct of attorneys. The State Bar's authority to investigate complaints of unprofessional conduct is the enforcement backbone of the regulatory scheme provided by the State of Virginia for licensed lawyers.[5]

[5] Virginia Supreme Court Rule 13 sets out procedures for enforcement of Supreme Court rules and regulations. *See* Rules of the Supreme Court of Virginia, Part 6, Section IV, Rule 13 (as published in 205 Va. 1011, 1040-42 (1964) and amended in 210 Va. 411 (1969)).

The Virginia statutes give the Supreme Court of Virginia general authority to prescribe a code of ethics governing the professional conduct of lawyers. *See* Virginia Code § 54-48(b). Pursuant to that authority, the Court has promulgated the Canons of Ethics and the Code of Professional Responsibility, which contemplate and approve minimum fee schedules (Findings of Fact, 355 F.Supp. at 498). Canon 12 of the Canons of Ethics and EC 2-18 and DR 2-106(B)(3) of the Code of Professional Responsibility expressly approve the use of minimum fee schedules promulgated by local bar associations (Findings of Fact, 355 F.Supp. at 499). In addition, the Virginia State Bar has in two advisory opinions signified its intention to regulate personal solicitation by lawyers, an ethics offense, at least partially by the use of suggested minimum fee schedules. Thus, habitual charging of less than the fee prescribed in a local minimum fee schedule can constitute the ethics offense of personal solicitation. *See* Opinion No. 98, June 1, 1960 (Ex. 30, App. 8); Opinion 170, May 28, 1971 (Ex. 31, App. 10).

Moreover, the State Bar has twice published Minimum Fee Schedule Reports setting forth and analyzing the existing fee schedules promulgated by various local bar associations in Virginia. The 1969 Report recommended that the fees contained therein should be assessed in 1969 for the specified legal services (Ex. 27, App. 2). Thus the State Bar, rather than issuing a state-wide fee schedule, relies upon local bar associations, in accordance with EC 2-18 and DR 2-106, to promulgate local fee schedules, using the state Minimum Fee Schedule Reports as a guide. *See* Virginia State Bar, Minimum Fee Schedule Report 3 (1969) (App. 2). The obvious purpose of this delegation of responsibility is to give local associations flexibility to

adjust the state recommended fees according to local circumstances. *Id.* Thus, Fairfax's role in promulgating its advisory fee schedule was that of a virtual functionary of the State Bar, attuned to local circumstances that should properly be considered in promulgating the recommended schedule.

Provisions of the Canons of Ethics and Code of Professional Responsibility on the point of minimum fee schedules, together with the State Bar Opinions and the language of the Minimum Fee Schedule Reports issued by the State Bar, demonstrate that local bar associations, including Fairfax, have issued suggested fee schedules in response to guidance from state regulatory authority. As in *Parker*, Fairfax's minimum fee schedule was never intended to operate by force of individual agreement or combination. To the contrary, it derived its authority and efficacy from a state proscription of personal solicitation and the state's approval of minimum fee schedules as a means of enforcing this proscription. Under these circumstances, to hold that local promulgation of an advisory fee schedule violates the antitrust laws would subject these lawyers to contradictory legal standards. For precisely this reason, the *Parker* v. *Brown* doctrine establishes the priority that state regulation shall prevail.

E.

Fairfax's Promulgation of a Suggested Fee Schedule Did Not Constitute Price-Fixing.

The Court of Appeals did not find it necessary to consider whether Fairfax had actually engaged in price-fixing. An examination of the facts in this case and the applicable law, however, reveals that Fairfax, in promulgating an advisory fee schedule, did not engage in price-fixing.

This Court has held that the exchange of price information among competitors does not constitute price-fixing unless it is established that such exchange is utilized to fix prices. *See Maple Flooring Manufacturers Association* v. *United States,* 268 U.S. 563 (1925). In addition, in the case at bar, there was no agreement to adhere to a price schedule. Moreover, the information in the schedule was general in nature, without the individual detail that this Court found fatal in *United States* v. *Container Corp. of America,* 393 U.S. 333 (1969).

The evidence adduced at trial clearly demonstrates that Fairfax intended its fee schedule to be advisory, to be used as one factor among many in determining a reasonable fee (Ex. 29, App. 5). Indeed, Fairfax never attempted to invoke the enforcement machinery of the State Bar against a member for failure to adhere to the fee schedule (Findings of Fact, 355 F.Supp. at 498). No disciplinary procedures nor threat of them have ever been undertaken in connection with a failure to observe the suggested fee schedules. *Id.* Moreover, all Virginia lawyers are constrained by the Code of Professional Responsibility to look at the fee customarily charged in their locality for similar services only as *one* of eight factors to be considered as guides in determining the reasonableness of a fee. *See* DR 2-106, Rules of the Supreme Court of Virginia, Part 6, Section II (January 1, 1971) (Findings of Fact, 355 F.Supp. at 500); Opinion No. 170, Virginia State Bar Committee on Legal Ethics (Ex. 31, App. 10). Thus the uncontradicted evidence is that the schedule was merely advisory.

Not only was there no intention on the part of Fairfax to fix fees, but promulgation of the advisory schedule did not have that effect. The evidence shows that members of the Association did not consistently adhere to the schedule

(Findings of Fact, 355 F.Supp. at 500). Even when a schedule fee was charged, it was only after an evaluation of its fairness, the time and labor required, the degree of expertise utilized, recent similar transactions and the other factors enumerated in Canon 12.

Finally, Fairfax has never attempted to circulate its advisory fee schedule to its members. It merely made the schedule available at the courthouse for those lawyers who wished to have it and made no effort to distribute it among the membership.

It is clear, therefore, that Fairfax's fee schedule was not intended and was not used to fix fees. There was no showing at the trial court level that price-fixing was contemplated, that the fee schedule entailed control of fees, or that there was any effect on fee levels whatsoever. Any discipline to be imposed in connection with charging less than the suggested fees would not be imposed for failure to adhere to the minimum fee schedule as such, but would be directed against the unethical practice of solicitation under the rules of the Virginia Supreme Court. *See* Opinion No. 98 of the Virginia State Committee on Legal Ethics, (June 1, 1960) (Ex. 30, App. 8). Since aiding compliance with the Code of Professional Responsibility is surely a legitimate regulatory purpose, the suggested fee schedule should not be treated as price-fixing.[6]

V.

CONCLUSION

The decision of the United States Court of Appeals is clearly correct and based upon sound principles of law and policy. It presents no conflict with the decisions of this

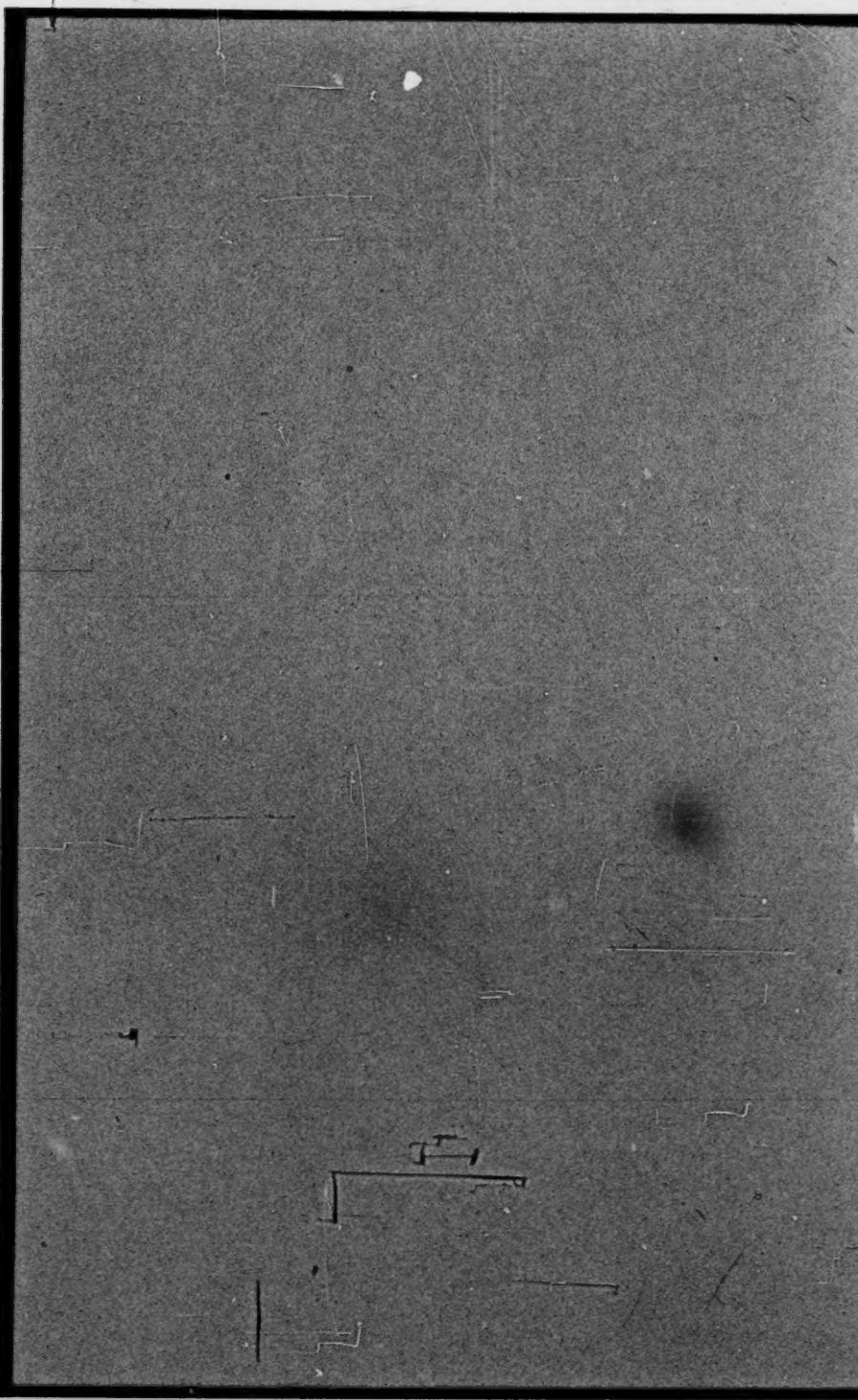
[6] *Cf. Matter of Freeman*, 40 App. Div. 2d 397, 400 (N.Y. 1973).

Court or the decisions of other circuits. The petition for a writ of certiorari should be denied.

Respectfully submitted,

LEWIS T. BOOKER
JOHN H. SHENEFIELD
T. S. ELLIS, III
GARY V. MCGOWAN
HUNTON, WILLIAMS, GAY & GIBSON
Post Office Box 1535
Richmond, Virginia 23212
Attorneys for Respondent Fairfax County Bar Association

APPENDIX



RESOLUTION OF FAIRFAX BAR ASSOCIATION

SEPTEMBER 16, 1974

WHEREAS, the Fairfax Bar Association defended the action and thereafter appealed the decision of the United States Court for the Eastern District of Virginia to the United States Court of Appeals for the Fourth Circuit in a certain lawsuit styled *Lewis H. Goldfarb, et al.* v. *Virginia State Bar, et al.* out of the Association's concern about the unprecedented application of the Antitrust Laws to the practice of law; and

WHEREAS, there is not now and never has been uniform adherence to any minimum fee schedule by members of the Fairfax Bar Association and no such schedule has been promulgated since February 2, 1973 when the aforesaid decision was rendered in the United States District Court for the Eastern District of Virginia;

NOW, THEREFORE, BE IT RESOLVED that the minimum fee schedule adopted by the Fairfax Bar Association on June 12, 1969, is hereby rescinded; that it is the intention of the Fairfax Bar Association not to reinstitute any such schedule; and all members of the Fairfax Bar Association will be notified accordingly.

EXHIBIT 27

VIRGINIA STATE BAR

MINIMUM FEE SCHEDULE REPORT

1969

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MINIMUM FEE SCHEDULE REPORT (1969)

Statement By Committee On Professional Efficiency And Economic Research

The Minimum Fee Schedule Report (1969) submitted herewith by the Committee on Professional Efficiency and Economic Research updates the previous report submitted by a similar committee and approved by Council in 1962. The report *does not* constitute a state-wide minimum fee schedule but, as in 1962, is a report on the analysis of existing suggested fee schedules in Virginia. The committee bases its report on an analysis of some twenty-two minimum fee schedules which have been adopted by local bar associations in Virginia. Copies of the spread sheets used for this analysis are attached for reference.

The recommended minimum fee figures in the committee's report represent the consensus recommendations of members of the committees as to the minimum fees which should be assessed in 1969 for the various legal services indicated.

It will be noted that the revised report reflects a general scaling up of fees for legal services. The committee feels that this is to be expected because of the escalating cost of operating a law office and the spiraling increase in the cost of living in recent years. In a few instances there are substantial differences in the 1969 recommended minimum fees compared with the 1962 recommended minimum fees. These wide differences are due largely to what the committee believes to have been inexact appraisals in the past of reasonable minimum fees for certain legal services. Experience during the past seven years has been sufficient to enable the committee to recommend adjustments to correct obvious errors in judgment, which incidentally were notably few in number. The present committee is certainly subject to errors

in judgment also, and future committees will undoubtedly find it necessary to make correcting recommendations based on accumulated experience.

The committee recommends that Council approve the Committee's report on minimum fee schedules and that the report be promulgated to the entire Bar of Virginia for its consideration. It should be clearly understood that no local bar association is bound by the committee's recommendations; that certain adjustments will have to be made in various circuits within the State. The schedule is submitted simply as recommendations and for the guidance of local bar associations.

* * *

EXHIBIT 29

MINIMUM FEE SCHEDULE

THE ALEXANDRIA BAR ASSOCIATION
THE ARLINGTON BAR ASSOCIATION
THE FAIRFAX BAR ASSOCIATION
THE LOUDOUN BAR ASSOCIATION

The following schedule was adopted by each of the above Bar Associations. The schedule is the same for each Bar Association except where noted to the contrary.

Effective date:

The Alexandria Bar Association—July 1, 1969
The Arlington Bar Association—July 8, 1969
The Fairfax Bar Association—June 12, 1969
The Loudoun Bar Association—July 21, 1969

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with the
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* * *

STATEMENT OF PURPOSES

The applicable canons of professional ethics established the standards for determining a reasonable fee which a lawyer should charge in a given case. The purpose of a minimum fee schedule is not to fix a reasonable fee under all circumstances but is, as the name implies, a suggested minimum fee for the average case. A minimum fee schedule is based on the assumption of an ordinary transaction with a minimum of complicating circumstances as well as a minimum of time and responsibility on the part of the lawyer. It does not profess to set a fee in given cases but is suggested as a guideline.

This schedule of proposed minimum fees is advisory only and is intended to be applied as a guide in determining the conduct of the local bar as to what should be charged as a minimum under the circumstances outlined above. In all cases, the individual lawyer has the responsibility of determining a proper fee under all circumstances. There is no intention to require that the individual lawyer should use this schedule as a means of evading his ultimate responsibility to fix a fair and reasonable fee considering all of the circumstances of a particular case.

As a caveat it should be observed that the Virginia State Bar Committee on Legal Ethics, in Opinion 98 rendered June 1, 1960, ruled that a lawyer who intentionally and regularly charges less than the customary charges of the Bar for similar services as reflected in a schedule of suggested minimum fees for the purpose of increasing his business, with resulting personal gain, violates the Canons of Ethics in that his actions constitute a form of solicitation. Thus consistent and intentional violation of the suggested minimum fee schedule for the purpose of increasing

business can, under given circumstances, constitute solicitation.

With these above considerations in mind, it should be realized that the schedule does not prohibit a lawyer from rendering legal services without charge or for less than the minimum charges specified herein to charitable or religious associations, to persons who would otherwise lack protection of their legal rights, or for any other proper ethical consideration which justifies the fee in a particular case. Solicitation thus is determined by the particular circumstances involved, but can exist from a repeated course of action by attorneys who fit within the purview of Opinion 98 specified herein. It is strongly recommended that all lawyers read Opinion 98.

As a parallel consideration, it is just as improper for a lawyer to imply to clients or prospective clients that another lawyer who charges more than the minimum fees specified in this schedule is acting improperly. To do so would be to intimate what is not true. This is not a schedule of usual, regular or maximum fees and to state otherwise or publicly criticize lawyers who charge more than the suggested fees herein might in itself be evidence of solicitation on the part of any lawyer making such a suggestion.

The adoption of this schedule by the Bar Association is a public pronouncement of its determination to enhance the prestige of the Bar. With that end in view the recommended fees listed in this schedule are to be taken as a conscientious effort to show lawyers in their true perspective of dignity, training and integrity. Each lawyer must establish his own fees and the suggested minimum fee schedule set forth herein is to be used by lawyers as a guideline in appropriate cases. This document is not intended and should never be used to replace the individual discretion of attorneys to set their fees depending upon the particular circumstances of each particular case.

EXHIBIT 30

OPINION No. 98

JUNE 1, 1960

Subject:

Effect of "minimum fee schedule" adopted by a bar association.

Inquiries:

A lawyer, engaged in practice in a city where the local bar association has adopted a schedule of minimum fees to be charged for certain legal services, has referred to this Committee the following questions:

1. May a lawyer set his fees at sums less than charges suggested by a "schedule of minimum fees" adopted by his local bar association?

2. May the lawyer repeatedly charge such smaller fees?

It is important to observe that the inquiring lawyer states that his local association has adopted the schedule as a suggestion to its members, and has not undertaken to make its observance obligatory.

Opinion:

These inquiries are controlled by Canon 12 of the Canons of Professional Ethics. After reciting that in determining a fee, a lawyer may consider several influencing factors, one of which concerns charges customarily made by others for similar services, the Canon continues:

> "* * * No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

> "In determining the customary charges of the Bar for similar services, it is proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association, but no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee."

It follows that normally a lawyer may properly set his fee at a sum less than that suggested by a locally approved minimum fee schedule where, as hereafter stated, such charge appears justified.

We fully approve the recital in Canon 12 concerning minimum fee schedules that "no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee." We also are of the opinion that each lawyer has both a right and an ethical duty to charge a fee lower than that recited in a minimum fee schedule where the time required for the particular service, and its value, are themselves minimal, or where the poverty of a client, or other proper ethical consideration justifies such lower charge.

However, this is to be distinguished from the situation existing where a lawyer, purely for his own advancement, intentionaly and regularly bills less than the customary charges of the bar for similar services as reflected in a schedule of suggested minimum fees. Where the motive prompting the lawyer to repeatedly charge less is to increase his practice with resulting personal gain, it becomes a form of solicitation contrary to Canon 27 and also a violation of Canon 7, which forbids the efforts of one lawyer to encroach upon the employment of another. To ignore such schedules under these circumstances has no ethical justification and deserves censure.

EXHIBIT 31

VIRGINIA STATE BAR
COMMITTEE ON LEGAL ETHICS
OPINION NO. 170

May 28, 1971

Subject: Minimum Fee Schedule adopted by local bar Associations.

Inquiry: Does the Legal Ethics Committee adopt formally ABA Opinion 323 and does the Committee affirm the statements set forth in Legal Ethics Opinion 98 of this Committee?

ABA Formal Opinion 323 holds that minimum fee schedules can only be suggested or recommended and cannot be made obligatory, but that such minimum fee schedule is *one* element along with the other elements stated in Canon 12 and DR 2-106(B), which a lawyer should consider in determining a proper fee. The ABA opinion also holds that if a lawyer wantonly ignores the customary charges for similar services in his community in fixing his own fees, then he is failing to take into account one element which both Canon 12 and DR-106(B) say should be considered and if it is established through extrinsic evidence that he is doing this for unethical purposes, then all of this evidence taken together *may* establish unethical conduct. The ABA opinion concludes by stating that the Committee "has no hesitancy in holding that mere failure to follow a minimum fee schedule, even when habitual, cannot, standing alone and absent evidence of misconduct, afford a basis for disciplinary action. There are too many other elements to be considered (five under Canon 12, seven under DR 2-106) which might justify departure from the fee schedule."

Your Committee agrees that minimum fee schedules cannot be made obligatory and that such schedules are but one element to be considered along with those set forth in Canon 12 and DR 2-106(B) in determining a proper fee.

Your Committee disagrees with that part of the ABA formal opinion 323 that holds that mere failure to follow a minimum fee schedule, even where habitual, cannot, standing alone and absent evidence of misconduct, afford a basis for disciplinary action. It is the opinion of this Committee that evidence that an attorney *habitually* charges less than the suggested minimum fee schedule adopted by his local bar Association, raises a presumption that such lawyer is guilty of misconduct and requires the lawyer to produce evidence that such charges are not made for the purpose of soliciting business but because the elements set forth in Canon 12 and DR 2-106 justify departure from the suggested minimum fee schedule.

This Committee reaffirms the statements contained in Virginia State Bar Legal Ethics Opinion 98.

The member of the Bar requesting this opinion is entitled to note an appeal to the Council within ten days from the date of mailing. This opinion will be presented to the Council at its next meeting on June 10, 1971.

/s/ N. S. Clifton

N. Samuel Clifton
Executive Director

May 28, 1971

EXHIBIT 36

UNITED STATES DEPARTMENT OF JUSTICE
Washington, D. C.

(Seal Omitted)

Address Reply to the Division Indicated
Refer to Initials and Number
LL:RLW:LB
60-360-0

November 24, 1961

Robert A. McGinnis, Esquire
McGinnis, Berg, Shadyac and Nolan
2014 16th Street, N.
Arlington, Virginia

Dear Mr. McGinnis:

This is in reference to your letter of October 12, 1961, in which, as Chairman of a committee to study the advisability of the Arlington County Bar Association's adoption of a proposed or suggested minimum fee schedule, you requested the advice of the Antitrust Division as to whether or not the adoption of such a fee schedule would violate the federal antitrust laws.

The Antitrust Division has never taken the position in the past that advisory minimum fee schedules established by Bar Association were subject to prosecution under the federal antitrust laws. It should be noted, however, that the posture of the Division in these matters was based primarily upon the presence of the following factors:

1. The activities of the local Bar Associations were not "in commerce" and did not appear to have a significant "affect" [sic] upon interstate commerce; and

2. The fee schedules established were not agreed upon as the amounts to be charged, but were advisory only and not mandatory or binding upon either the members of the profession or the Association concerned.

With respect to the latter, it would appear that certain canons of the established canons of ethics require that the individual lawyer retain responsibility for the establishment of his own fees and retain the freedom to make appropriate charges where the usual fees are not appropriate.

I hope that this may be of assistance to you.

Sincerely yours,

Lee Loevinger
Assistant Attorney General
Antitrust Division

by /s/ Robert L. Wright
Robert L. Wright
First Assistant

EXHIBIT 40

UNITED STATES DEPARTMENT OF JUSTICE
Washington, D. C. 20530

(Seal Omitted)

Address Reply to the Division Indicated
Refer to Initials and Number
DFT:LB
60-360-0

July 8, 1965

Mr. Hugh C. Cregger, Jr.
President, Arlington County
Bar Association
Court House
Arlington, Virginia

Dear Mr. Cregger:

This acknowledges receipt of your letter of June 14, 1965 in which you indicate the position of the Arlington County Bar Association towards minimum fee schedules.

We note that in conformance with our recent discussion you have informed each member of the Association that any published schedule is not binding in any way and that each lawyer should establish his own fees based on considerations of time, experience, etc. We understand that after this matter has been discussed by the Association and

its committees this Fall you will advise us of any further measures taken by the Association.

Sincerely yours,

Donald F. Turner
Acting Assistant Attorney General
Antitrust Division

By /s/ Lewis Bernstein
Lewis Bernstein
Chief
Special Litigation Section